CASES AND MATERIALS
ON THE LAW
OF TORTS
EXPERIMENTAL EDITION
PART I

E.R. Alexander

J.B. Dunlop

Faculty of Law

University of Toronto

1987

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CHAPTER I: INTRODUCTION

Section 1

The Nature and Purpose of the Law of Torts

The recognition of the Law of Torts as a sufficiently singular body of law to merit identification by a rubric and segregated consideration in a legal treatise goes back only to about 1860 when an Englishman and an American published books on the subject. The word "tort", of course, was to be found both in English and French long before, and in both languages it meant "wrong". It had equivalents in Spanish and Italian and derived from the Latin "tortus", meaning "twisted" or "wrung". And, rubrics aside, the kind of problem with which this branch of the law concerns itself has been around as long as people have lived together in society, and has called for, and received, legal attention.

Wherever people live together in society the activities of some invade the interests of others and cause harm, sometimes intentionally, sometimes negligently, sometimes quite by accident. In England, let us say about the year 1066, the harm tended to be inflicted in fairly straight-forward fashion upon fairly tangible interests. People struck each other, or threatened to, spoke ill of each other, went on each other's land, and seized possession of or damaged horses and cows, pigs and sheep and various items of inanimate personal property as well. To preserve the King's Peace and prevent aggrieved individuals from relying on self-help (or going without a remedy altogether) the Norman, and especially the Angevin kings sent judges about the country to settle disputes peaceably. In others words, to apply to them a Law of Torts, nameless though it still might be.

These royal courts were not, of course, the first courts in England to deal with such problems. Indeed the history books all say that the royal courts wrested jurisdiction away from local courts, to the disgruntlement of the barons who included the issue in the Magna Carta, in the long run to no avail. But that is another story. The point of concern here is that the royal courts were the first courts developing and applying a law common to all England, thereby giving birth to the title by which the English system of law became known. Prior to the Conquest there had simply never been a central government strong enough to construct such a centralizing and homogenizing institution.

Centuries later the Common Law system spread round the world with English settlers and colonists and it continues to prevail in the Anglophone provinces of Canada, the English-speaking countries, including the United States of America, and numerous other present and former parts of the British Empire and Commonwealth. So the activity of the royal courts in post-Conquest England constituted the genesis of our Law of Torts, albeit the present generation may show scant family resemblance to its distant progenitor.

It is perhaps needless to say that the royal courts were concerned with settling disputes other than those arising out of the injuries inflicted on some by the activities of others. Those other disputes do not concern us much in this course, however, and so, our focus is almost exclusively on the injuries, the kind of conduct causing them, and what the courts have done about it all. This is a field where the law is mostly judge-made.

Down through the centuries, as society developed and grew more complex, the opportunities for harmful contact increased, and activities capable of causing harm waxed more numerous, and the interests open to be invaded became more diverse and not quite so corporeal. The Law of Torts developed more or less apace. It fell to the industrial revolution of the 18th and 19th centuries, however, to do for the Law of Torts what Henry Ford did for the automobile: bring it into the big time. It generated new interests and created opportunities and

instrumentalities for invading them by bringing more people into the close contact of urban life, putting them to work in factories with machines, sending them travelling on new roads and new rails, and encouraging them to compete for business in the mushrooming field of commerce. It remained for the 20th century to develop the most destructive activity yet, motoring, and to add to it, the radio, television, the aeroplane, the computer and various kinds of looking and listening devices. In the course of it all, in addition to interests in physical integrity, honour and tangible property already mentioned, the law has come to recognize as worthy of protection interests in emotional tranquility, family relations and various forms of economic and commercial relations and prospects. Neither the list of activities causing harm nor the list of interests which the law will protect is closed.

In early times, compensation to the injured individual and penalties to the Crown might figure as remedies in the same court proceedings. In other words, not only was there no well-defined Law of Torts, there was not even a clear-cut distinction between criminal and civil law. But the first treatise of the common law, published in 1187 and attributed to Ranulf de Glanvill, remarked that "some pleas are criminal, and some are civil". Lord Mansfield in Atcheson v. Everitt, (1755) 1 Cowp. 382 at 391, 98 Eng. Rep. 1147 said "Now there is no distinction better known, than the distinction between civil and criminal law; or between criminal prosecutions and civil actions." And Windfield in his treatise the Province of the Law of Tort, in 1931, indicated (p. 201) that "Tort can be distinguished from crime in that the sanction for crime is punishment, while the sanction for tort is an action for damages."

So now we can say the criminal law proscribes anti-social behaviour under penalty of fine or imprisonment. The Law of Torts concerns itself only with reparation to the individual for the harm done.

Or is it that simple? Consider the following cases.

LOUDON v. RYDER
Court of Appeal. [1953] 2 Q.B. 202.

APPEAL from the verdict of a jury and judgment given thereon by Devlin J. in favour of the plaintiff for £5,500 damages for trespass and assault committed by the defendant.

The plaintiff's father, Mr. Lewis, in his lifetime, had told her that he proposed to leave her certain property in trust, No. 3 Coleherne Mews, in Kensington. Mr. Lewis died in April, 1950, and in May, 1950, the plaintiff attained 21 years of age. Mrs. Lewis was an executrix or trustee of her husband, and after his death she did not say anything about this declaration of trust; indeed, according to the plaintiff's evidence, her mother had told her that there was nothing for her. The plaintiff and one of her sisters, when at their mother's house after their father's death, opened and looked into a deed-box. In that box they found, inter alia, a document which showed that the plaintiff had become entitled to the flat, No. 3, Coleherne Mews, when she became 21 years of age. The plaintiff took the document out of the deed box and showed it to a solicitor whom she consulted.

Mrs. Lewis, the mother, had let No. 3, Coleherne Mews to a Mr. Loudon, to whom the plaintiff became engaged to be married. Mr. Loudon, on April 29, 1951, left the flat temporarily to go to Ireland on business, and the plaintiff went to live there. She changed the locks, and was there in possession of the flat on May 28, 1951, when she received a message from Staines, where Mrs. Lewis was then residing, " that they were going to " break into the flat.". Thereupon, the plaintiff barricaded the door of the flat, which was over a garage in the mews, and filled a pail half full of water. In the course of the morning there arrived in the mews in a motor-car the plaintiff's mother, Mrs. Lewis, who remained in the motor-car, her gardener, and Ryder, the defendant. The defendant was a friend of Mrs. Lewis and spoke in broken English.

The defendant and the gardener tried to enter the flat by the door; they could not. Thereupon a ladder was found and was

Section 2: The Origin of the Law of Torts: Herein of the Forms of Action

> So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms.
>
> Maine, Early Law and Custom, (1883)

Many conflicts which fall within the province of the Law of Torts (and other branches of the law for that matter) are settled by agreement between the parties. When a person who has suffered damage agrees to a certain sum by way of compensation, to accept a promise that something-or-other will not be done any more, to forgive and forget, or when an individual who has inflicted damage agrees to pay up, to cease and desist, to say he is sorry, the agreement may or may not be based on a keen regard for the true facts and the strict legal position. Many other factors can have a bearing on decisions of this sort; whether or not one has a well-developed sense of outrage, how badly and how quickly one might need the money, whether or not one wants to go to the expense and trouble of a lawsuit, how sure one could be of winning if one did, and so on. But when a conflict within the province of the Law of Torts is not settled by agreement then it normally falls to be resolved by a court and a court must try as hard as it can to find the true facts (what really happened between the parties to give rise to the conflict) and must apply the appropriate law to those facts (decide in accordance with the prevailing theory of liability whether the damager must compensate the damaged).

The procedure by which a dispute is brought before a court to have the facts determined and the law applied is called an action. The form an action is required to take is pretty well standard even though the facts and the relevant law may vary greatly. Commonly a writ is issued out of the court office, at the instance of the party seeking redress, directing the other party to defend the case or suffer the consequences. Pleadings and various discovery procedures help inform each side concerning the case which will be presented by the other, and eventually the matter comes to trial before the court (a judge, or a judge and jury). The emphasis is, or is intended to be, on getting at the facts as economically and expeditiously as possible so that the proper law may be selected and applied. This is, however, a relatively modern procedural achievement.

Until the late 19th century the form that an action took varied considerably according to the nature of the claim being prosecuted. And in early times, the form of the action seems to have been more important than the facts of the case or the law to be applied. This historical verity had a considerable bearing on the growth of a theory, or theories, of liability, and even into the 20th century it has had a strong impact on the way the courts think about and apply theories. So by way of background to Section 3, which will deal with the growth of the fault theory, we must try to understand a bit about the forms of action at Common Law.

Section 3: The Development of Liability Based on Fault

Modern tort law emphasizes the nature of the defendant's conduct: did he intend the plaintiff's injury or was he negligent with respect to it? In the vast majority of tort cases unless one of these forms of fault is present the defendant will escape liability. Torts like assault, battery, and false imprisonment, all descendants of the old writ of trespass, today require intentional conduct. Negligence, as a separate basis of modern tort liability, is a descendant of the old writ of trespass on the case. As we saw in the last section, however, the important historical distinction between trespass and case lay in the nature of the causal connection between the defendant's conduct and the plaintiff's injury, not in a distinction between kinds of fault. If the injury was traceable directly to the defendant's conduct, trespass was the proper remedy, if merely consequential from that conduct, case. Both might involve intentional or negligent conduct on the defendant's part, but, while case always required one or the other form of fault, trespass did not. Historically strict liability could be imposed in trespass.

Many of the cases in Section 3 are concerned with the gradual shift in emphasis in trespass and case from the causal connection to the nature of the defendant's conduct, and the eventual acceptance of fault as an essential element in both actions. But as some of the cases indicate, procedural differences based on the distinction between direct and indirect injuries may still survive. As a result there may still be some truth in Professor Maitland's famous aphorism (supra, p.43) that "the forms of action we have buried, but they still rule us from their graves".

The last two cases in this chapter raise questions about the wisdom in requiring fault in at least certain kinds of tort actions.

THE CASE OF THORNS

1466. Year Book, 6 Ed. IV, 7, pl. 18 (as reported in Bessey v. Olliot & Lambert (1681), T. Raym. 467; 83 E.R. 244)

Trespass quare vi & armis clausum fregit, & herbam suam pedibus conculcando consumpsit in six acres. The defendant pleads, that he hath an acre lying next the said six acres, and upon it a hedge of thorns, and he cut the thorns, and they *ipso invito* fell upon the plaintiff's land, and the defendant took them off as soon as he could, which is the same trespass; and the plaintiff demurred; and adjudged for the plaintiff; for though a man doth a lawful thing, yet if any damage do thereby befal another, he shall answer for it, if he could have avoided it. As if a man lop a tree, and the boughs fall upon another *ipso invito*, yet an action lies. If a man shoot at buts, and hurt another unawares, an action lies. I have land through which a river runs to your mill, and I lop the fallows [468] growing upon the river side, which accidentally stop the water, so as your mill is hindered, an action lies. If I am building my own house, and a piece of timber falls on my neighbour's house and breaks part of it, an action lies. If a man assault me, and I lift up my staff to defend myself, and in lifting it up hit another, an action lies by that person, and yet I did a lawful thing. And the reason of all these cases is, because he that is damaged ought to be recompensed. But otherwise it is in criminal cases, for there *actus non facit reum nisi mens sit rea.*

Assault, battery, and false imprisonment, as descendants of the old writ of trespass, were actionable without proof of injury. All the plaintiff need prove was that the defendant interfered directly with his person. Today, however, as we saw in section 3 of the last chapter, these torts probably require intentional conduct by the defendant. The defendant must have intended to interfere with the plaintiff, although actual injury is still unnecessary. Among other matters the cases in this Chapter explore the meaning of intention and how it differs from motive.

Another matter raised by this Chapter is the nature of the interest protected in cases involving intentional interference with the person. Is it the physical person of the plaintiff, or his feelings, or both? Battery requires physical contact with the plaintiff, but no real injury, and it often seems as if it is his outraged feelings that are being protected. In assault actions, where the essence of liability is apprehension of contact, clearly a purely mental element is involved. And the controversy in the false imprisonment cases over whether the plaintiff must be aware of the imprisonment at the time it occurs emphasizes the dichotomy between the physical person of the plaintiff and his feelings. The intentional infliction of mental suffering cases are concerned directly with the emotional state of the plaintiff, although many jurisdictions require as a condition of recovery that substantial physical or other consequences accompany the mental disturbance.

Some of the cases in Section 3 of this Chapter move from the protection of the plaintiff's person to the protection of a property interest he may have in his name or photograph. From one aspect, the unfair business practices involved in such cases can be viewed as invasions of the plaintiff's privacy, and privacy is expressly recognized as one of the bases of liability in the American case reproduced towards the end of the Chapter. Except for a recent Ontario County Court case (infra, p.173), Canadian courts have not recognized a tort of invasion of privacy, although legislation in a number of provinces has. The British Columbia Privacy Act is set out at p.156 , infra.

Section 1: Assault and Battery

COLE v. TURNER

Nisi Prius. 1705. 6 Mod. 149; 87 E.R. 907

Holt, Chief Justice, upon evidence in trespass for assault and battery, declared,

First, that the least touching of another in anger is a battery.

Secondly, if two or more meet in a narrow passage, and without any violence or design of harm, the one touches the other gently, it will be no battery.

Thirdly, if any of them use violence against the other, to force his way in a rude inordinate manner, it will be a battery; or any struggle about the passage to that degree as may do hurt, will be a battery (*a*).

Note, It was in action of battery by husband and wife, for a battery upon the husband and wife, *ad damnum ipsorum;* and though the plaintiff had a verdict, yet the Chief Justice said, he should never have judgment.

And the judgment was after arrested above upon that exception.

CHAPTER III: INTENTIONAL INTERFERENCE WITH PROPERTY

Trespass to land, like the various trespasses to the person descended from the old writ of trespass, is, like they are, actionable without proof of injury. The unauthorized entry on the land is considered sufficient injury in itself. However, the possibility of strict liability for trespass to land has persisted much longer in our law than it has with respect to other forms of trespass. Nevertheless, today we can probably say that in a trespass to land action the defendant must have intended the invasion, although the question of whether strict liability could still be imposed was mooted in a Canadian case in Section 1 as recently as 1959. And a vestige of strict liability remains in the rule that once the defendant is found to be a trespasser on the plaintiff's land he is liable for any damage he does without regard to his fault.

Some of the cases in Section 1 are concerned with the nature of the interest being protected: sometimes under the guise of trespass to land the real interests being protected seem to be economic or personal. Other cases in the section are concerned with an occupier's right to turn a licensee into a trespasser by terminating his license.

The cases in Section 2 on trespass to goods and conversion, although a barely adequate introduction to a technical subject, furnish further fact-situations for exploring the meaning of intent and how it differs from motive. The distinction between trespass to goods and conversion is one between minor and major interferences with chattels, and can be a difficult one to draw.

Under the rubric of nominate torts like conspiracy, intimidation, defamation and nuisance, the cases in Section 3 are concerned with protecting certain economic interests against unfair business practices. These interests, involving as they do the jobs and businesses of people, seem closer to property interests than to personal interests, although the affinity between the tort of intimidation and such personal torts as assault and intentional infliction of mental suffering seems clear.

Section 1: Trespass to Land

ENTICK v. CARRINGTON
Common Pleas. 1765. 19 State Trials 1029

LORD CAMDEN, L.C.J. ... By the laws of England every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without any licence but he is liable to an action, though the damage be nothing. ...

SMITH v. STONE
King's Bench 1647 Style 65; 82 E.R. 533

Smith brought an action of trespasse against Stone pedibus ambulando, the defendant pleads this speciall plea in justification, viz. that he was carryed upon the land of the plaintiff by force, and violence of others, and was not there voluntarily, which is the same trespasse, for which the plaintiff brings his action. The plaintiff demurs to this plea: in this case Roll Iustice said, that it is the trespasse of the party that carryed the defendant upon the land, and not the trespasse of the defendant: as he that drives my cattel into another mans land is the trespassor against him, and not I who am owner of the cattell.

BASELY v. CLARKSON
Common Pleas 1680 3 Levinz 37; 83 E.R. 565

Trespass for breaking his close called the *balk* and the *hade*, and cutting his grass, and carrying it away. The defendant disclaims any title in the lands of the plaintiff, but says that he hath a *balk* and *hade* adjoining to the balk and hade of the plaintiff, and in mowing his own land he involuntarily and by mistake mowed down some grass

CHAPTER IV: DEFENCES TO ACTIONS FOR INTENTIONAL INTERFERENCE WITH PERSON AND PROPERTY

A defendant who intentionally invades a plaintiff's interests may escape liability in a number of ways, some of which we have already seen. For example, in section 3 of the last chapter we saw that a defendant may intentionally interfere with a plaintiff's economic interests without incurring liability when that interference is the inevitable result of pursuing his own legitimate interests. And in the next chapter we will see other examples of defendants escaping liability for what is prima facie intentionally tortious conduct.

In this Chapter we will deal with four distinct defences: consent, self-defence and defence of others, protection of property, and legal authority.

Section 1: Consent

"The pronounced individualism of the common law is reflected in the axiom that no wrong is done to one who consents - volenti non fit injuria. The courts have traditionally adhered to John Stuart Mill's postulate that, save in exceptional circumstances, it is not the law's function to save a man from himself rather than leave him free to dispose of his own interests as he pleases". Fleming, Law of Torts, 6th ed. 1983, at p.73 (footnote omitted).

The most interesting and important consent cases involve actions against doctors for "surgical assault" (technically battery). Such actions should be distinguished from malpractice actions, where the issue is whether the doctor has been negligent in his treatment of the patient. In the surgical assault cases the patient is not complaining about the adequacy of the treatment, but about the fact of treatment. Normally a doctor must obtain a patient's consent before in any way interferring with his person. Normally a doctor's failure to obtain consent results in a judgment against him for surgical assault.

The medical cases in this Section are concerned first with the questions of when consent is necessary and who can give it when it is necessary, and second with the question of how much the doctor has to tell the patient in order to make his consent effective. The latter question raises the further question of whether, if the doctor has not told the patient enough, the proper form of action is surgical assault or malpractice.

The last few cases in the Section are concerned with consents obtained by duress or fraud.

AMERICAN LAW INSTITUTE, RESTATEMENT OF TORTS, s. 50

§ 50. Actual and Apparent Assent.

(1) An actual assent is given by words or conduct which are intended to express a willingness to submit to the invasion and are so understood by the person invading the interest.

(2) An apparent assent is given by words or conduct which, while not intended to express a willingness to submit to the invasion, would be understood by a reasonable man to be so intended and are so understood by the person invading the interest.

In Graham v. Saville, [1945] O.R. 901 (H.C.), the defendant, a married man, told the plaintiff he was a bachelor and asked her to marry him. She agreed and gave up a small business she operated and purchased wedding clothes. The parties went through a marriage ceremony and lived together for 18 days. The defendant then left the plaintiff. The plaintiff had a baby 8 months later. The plaintiff recovered a judgment for $4,000 in an action against the defendant for fraudulent misrepresentation.

Could the plaintiff have sued for battery? See Smythe v. Reardon, [1949] Q.S.R. 74 (Stanley, J.).]

Has B an action against A in the following cases?

1. A tells B, his date, that he is going to kiss her. B says nothing and A kisses her.

2. A tells B he is going to punch him in the nose. B says nothing and A hits him in the nose.

3. B, a girl of 15, consents to intercourse with A, a man of 25. This is an offence on A's part under s. 146 of the Criminal Code, R.S.C. 1970, c. C-34. See Bishop v. Liston (1924), 199 N.W. 825 (Neb., S.C.); Madelana v. Kuun (1987), 35 D.L.R. (4th) 222 (B.C. MacKinnon J.).

4. B attempts to commit suicide by jumping off a bridge. A uses force to prevent him from doing so. See McFarland v. Steward (1900), 19 N.Z.L.R. 22 (C.A.). Suppose A is a doctor and works on the unconscious B (who took an overdose of sleeping pills) to save his life. Would A have a claim against B for compensation for his services? See Matheson v. Smiley, [1932] 2 D.L.R. 787 (Man., C.A.).

5. A taps B on the shoulder to attract his attention. See Coward v. Baddeley, supra, at p. 73.

6. B consents to intercourse with A for a payment of $20. A gives her a counterfeit twenty-dollar bill.

RECOMMENDED READING

1. Bohlen, Consent as Affecting Civil Liability for Breaches of the Peace (1924), 24 Col. L. R. 819.

2. McCoid, A Reappraisal of Liability for Unauthorized Medical Treatment (1957), 41 Minn. L. Rev. 381.

3. Skegg, Capacity of Minors to Consent to Medical Treatment on Themselves (1969), 4 Recent Law 295.

4. Cannon, The Right to Die (1970), 7 Houst. L.R. 654.

5. The Medical Consent of Minors, 12th Report of the Royal Commission on Family and Children's Law (B.C., 1975).

6. Baruch, Aids in the Courts: Tort Liability for the Sexual Transmission of Acquired Immune Deficiency Syndrome (1987), 22 Torts & Ins. L.J. 165.

Section 2: Self-Defence and Defence of Others

The common law has recognized self-defence as a good defence to a battery action since about 1400. The legal principles involved in the defence are not particularly difficult. The issue that most often arises is: did the defendant use excessive force in defending himself? The privilege to defend others against attack is also well settled, the only unresolved question being to whom does the privilege extend.

BRUCE v. DYER
Ontario High Court. (1966), 58 D.L.R. (2d) 211

FERGUSON, J.:—This is an action for damages for assault tried before me without a jury at the Toronto non-jury sittings. The plaintiff's case is that he was assaulted by the defendant on the highway near Barrie, Ontario, on May 18, 1964, as a result of which he suffered severe physical injuries. . . .

As they were proceeding along the extension of Hwy. 400 about 12 or 14 miles north of Barrie, Ontario, the defendant came upon a line of four cars ahead led by a panel truck, the plaintiff's car being next in line behind the panel truck, with an interval between said to be four or five car lengths. At this point the extension of Hwy. 400 is a two-lane road. Their speed is put by the evidence at an indefinite 45-60 m.p.h. The defendant came upon this line of cars and remained behind, keeping station with them when as they approached a grade, said to be at least 200 yards long, the fourth car pulled out of line and passed the three cars ahead of him and the panel truck. The defendant, being now somewhat nearer the grade, pulled to the left into the passing lane and proceeded to pass the traffic in front of him. I find on the evidence that when the defendant commenced to pass there was sufficient space between the panel truck and the plaintiff for the defendant to enter in safety. When the defendant reached the gap separating the panel truck from the plaintiff's vehicle, the glow from the headlights of an oncoming vehicle appeared over the crest of the grade. The defendant seeing the glow of the headlights of the approaching vehicle, proceeded to pull to the right into the space between the panel truck and the car driven by the plaintiff. At this point, he heard an unexpected blast of the horn of an automobile, and on glancing to his right he saw the plaintiff's vehicle to the right of the rear of his vehicle in the driving lane. The defendant says, and I believe him, that as he was passing the plaintiff, the plaintiff accelerated closing the gap between his car and the panel truck from four to five car lengths to two car lengths, thus preventing the defendant from entering this space, leaving him to face the oncoming car in the passing lane, thus endangering the life of the defendant and his family as well as his own.

The defendant being thus endangered and being unable to get in behind the panel truck applied his brakes and, fortunately for all concerned, there was then sufficient space between the plaintiff's vehicle and the next behind for the defendant to re-enter the driving lane safely. The plaintiff noticed the defendant pull out of line behind him and admits that he, the plaintiff, knew the defendant was endeavouring to pass. He says, however, that the defendant was endeavouring to pass him while going up a hill, and that there was at the point in question, two white solid lines on the pavement. According to the plaintiff the defendant cut over and attempted to move into his lane. The front wheels were "just ahead of mine" which he says caused him some anxiety. He admits that he put his hand on the horn and that the defendant had to swing to his left to obtain room to drop back. He realized the defendant was in danger, but in spite of this he accelerated. There was no contact between the cars. He saw the lights of the oncoming vehicle coming over the hill and he admits that he knew it would create a danger to the defendant who, to his own observation, was pulling ahead and endeavouring to get into the driving lane. He was asked on

that she personally was attacked and it is my direction to you to approach this case on the footing that it is no defence for [the appellant] to say she was going to the assistance of her sister."

Again " in my judgment there is no excuse in law for her to attack Akbar in those circumstances ". Then this passage appears: ". . . I don't think that the defence of self-defence, or the defence of her sister, is open to [the appellant] ". In view of this direction, it would seem that the judge was in effect telling the jury that the appellant must be convicted on the indictment and that the only question for them to consider was whether the case proved against her was one of wounding with intent or—as the jury in fact found—one only of unlawful wounding.

The source of error in this case, as it appears to this court is, as we have said, that everyone, including counsel at the trial and again before us, seems to have overlooked that in reality and in law the case of the appellant was not trammelled by any technical limitations on the application of the plea of self-defence, and this court is not here concerned to consider what those limitations are. Quite apart from any special relations between the person attacked and his rescuer, there is a general liberty even as between strangers to prevent a felony. That is not to say, of course, that a newcomer may lawfully join in a fight just for the sake of fighting. Such conduct is wholly different in law from that of a person who in circumstances of necessity intervenes with the sole object of restoring the peace by rescuing a person being attacked. That, credible or otherwise, was the basic defence advanced by the appellant. It is true that the judge had this to say about it:

" I need only remind you again that it is [the appellant's] case that she was going to the rescue of her sister and that was why she hit Akbar with a bottle, she could not get him off her sister."

The earlier directions of the judge had indicated, however, that such a case afforded no defence in law. We think that this was a misdirection. The necessity for intervening at all and the reasonableness or otherwise of the manner of intervention were matters for the jury. It should have been left to them to say whether, in view of the appellant's proved conduct, such a defence could possibly be true, they being directed that the intervener is permitted to do only what is necessary and reasonable in all the circumstances for the purpose of rescue. It might well be that, having been so directed, the jury would nevertheless have returned the same verdict, but we do not consider that this would necessarily have been so. The appellant was at least entitled to have her case left to the jury. This unfortunately was not done, and this court accordingly has no alternative but to allow the appeal and quash the conviction. The appellant is accordingly now discharged.

Appeal allowed. Conviction quashed.

[In Cachay v. Nemeth (1972), 28 D.L.R. (3d) 603 (Sask., Tucker, J.), the plaintiff, who had been behaving playfully at a party, pulled the defendant's wife's head back while she was dancing with another man and kissed her. Thereupon the defendant delivered a karate blow to the plaintiff's face breaking his jaw and two teeth. The Court gave judgment for the plaintiff because, although the defendant was privileged to defend his wife, the force used was excessive.]

RECOMMENDED READING

Perkins, Self-Defense Re-Examined (1954), 1 U.C.L.A. L. Rev. 133.

Section 3: Protection of Property

The cases in this section are concerned with two related defences: the defence of the possession of property and necessity.

Normally a person in possession of land can use reasonable force to remove a trespasser from his land. However, the possessor cannot remove a trespasser if to do so would put him in a position of danger. Or looking at it from the point of view of the trespasser, in some circumstances there may be a privilege to trespass.

Necessity is an unusual defence; under it a defendant is privileged to interfere intentionally with the interests of an innocent plaintiff in order to prevent harm to his own interests or those of the community. Some American courts have recognized a distinction between public and private necessity based on the nature of the interest the defendant is advancing. The privilege of a public champion is held to be complete "in the sense that it both justifies the infliction of injury and also exempts the actor from being required to make compensation.": Fleming, Law of Torts, 6th ed. 1983, at p.87 (footnote omitted). On the other hand, where the defendant is acting to protect only an interest of his own, the privilege is incomplete in the sense that it "justifies a technical interference with the plaintiff's property and enjoins the latter from resisting it, but does not relieve the invader from liability to pay for any actual damage done.": ibid., at p.90.

AMERICAN LAW INSTITUTE, RESTATEMENT OF TORTS 2d, s. 77.

§ 77. Defense of Possession by Force Not Threatening Death or Serious Bodily Harm

An actor is privileged to use reasonable force, not intended or likely to cause death or serious bodily harm, to prevent or terminate another's intrusion upon the actor's land or chattels, if

(a) the intrusion is not privileged or the other intentionally or negligently causes the actor to believe that it is not privileged, and

(b) the actor reasonably believes that the intrusion can be prevented or terminated only by the force used, and

(c) the actor has first requested the other to desist and the other has disregarded the request, or the actor reasonably believes that a request will be useless or that substantial harm will be done before it can be made.

[In Robson v. Hallett, [1967] 2 All E.R. 407 (Q.B.D.), a case involving assaults upon police officers investigating an offence, Diplock, L.J., said (at p. 414):

> These appeals raise three simple points on the law of trespass on land which affect all members of the public as well as the police officers with whom this appeal is concerned. The points are so simple that the combined researches of counsel have not revealed any authority on them. There is no authority because no one has thought it plausible up till now to question them. The first is this, that when a householder lives in a dwelling house to which there is a garden in front and does not lock the gate of the garden, it gives an implied licence to any member of the public who has lawful reason for doing so to proceed from the gate to the front door or back door, and to inquire whether he may be admitted and to conduct his lawful business. Such implied licence can be rebutted by express refusal of it, as in this case the Robsons could no doubt have rebutted the implied licence to the police officers by putting up a notice on their front gate "No admittance to police officers"; but that was not done in this case. The second proposition is this, that when, having knocked at the front door of the dwelling-house, someone who is inside the dwelling-house invites the person who has knocked to come in, there is an implied authority in that person, which can be rebutted on behalf of the occupier of the dwelling-house, to invite him to come in and so licence him to come into the dwelling-house itself. In the present case, it was the son, the appellant Thomas Robson, and not the father who was the occupier who invited Sgt. McCaffrey to come in. In those circumstances, Sgt. McCaffrey, whilst in the dwelling-house on the invitation of the son, was no trespasser. The licence, however, could be withdrawn by the father who was the person entitled to give it. He withdrew it and, on its being withdrawn, the sergeant had a reasonable time to leave the premises by the most appropriate route for doing so, namely, out of the front door, down the steps and out of the gate, and, provided that he did so with reasonable expedition, he would not be a trespasser while he was so doing.

See also R. v. Peters (1970), 16 D.L.R. (3d) 143 (Ont. C.A.).]

is best for their borough as a whole. It is a matter of policy in the widest sense of the word—a political matter. The council is an elected body in a democratic society. If its policy—the policy which it prefers in a matter in which policy-making is for it—is not that which is accepted by the community as a whole, then the community has its remedy in a democratic society. But what is suggested here is that individuals have the right in law to take steps to enter the property of the council with the intention and necessary result of defeating the policy which that elected body has decided to be the appropriate policy. In my judgment the doctrine of necessity in this country does not go so far, or anything like so far, as to say that those who take such a step in such circumstances are not committing an offence against the law, or that when they go on property of another they are not trespassing. I agree with the order proposed by Lord Denning MR for the reasons which have been given by him. I agree also with the views expressed by him and by Edmund Davies LJ as to the extent of the doctrine of necessity in our law.

Appeals dismissed with costs. Orders for possession in 28 days.

[For a thorough discussion of the defence of necessity in criminal law see Perka v. The Queen (1984), 13 D.L.R.(4th) 1 (S.C.C.).]

[Milner, The Trespasser: Two Problems (1974), 27 Cur. Leg. Prob. 37.]

Consider the following problems:

1. B, a member of the family of the janitor of an apartment house, fell ill with a highly contagious disease. A, the owner of the building, ejected her from the building. See Tucker v. Burt (1908), 115 N.W. 722 (Mich., S.C.).

2. A instals a spring gun in his watermelon patch, and puts warning notices in prominent locations around his property. B ignores the notices and is shot by the spring gun.

3. A shoots B's prize winning dog who is in the process of killing A's alley cat.

4. A phones B long distance and tells him that his cottage (B's) is about to fall over a cliff because of storm-caused soil erosion. B says: "Oh well it is not much of a cottage, and, anyway, I am insured.". A, at considerable expense to himself, enters B's land and drags the cottage back from the edge of the cliff, causing considerable damage to the cottage in the process. See Sherrin v. Haggerty, [1953] O.W.N. 962 (Anderson, C.C.J.).

5. A, seeing B's parked car start down a slight incline and about to crash into another car reached in the open window and turned the steering wheel. B's car went over an embankment and was completely destroyed. See Proudman v. Allen, [1954] S.A.S.R. 336 (S.C., Hannan, A.J.).

RECOMMENDED READING

1. Bohlen, Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality (1926), 39 Harv. L. Rev. 307.

2. Williams, The Defence of Necessity (1953), 6 Current Legal Problems 216.

3. Sussman, The Defence of Private Necessity and the Problem of Compensation (1967), 2 Ottawa L. Rev. 184.

4. Posner, Killing or Wounding to Protect a Property Interest (1971), 14 J. of Law & Ec. 201.

5. Palmer, Iowa Spring Gun Case: A Study in American Gothic (1971), 56 Iowa L. Rev. 1212.

6. Harlow, Protection of Property (1972), 122 New L.J. 541.

Section 4: Legal Authority

We dealt with cases of false imprisonment and arrest in Section 2 of Chapter II on Intentional Interference With The Person. There we were concerned mainly with what constitutes an imprisonment or arrest. The question of whether it was a false imprisonment or arrest was secondary. In contrast, the cases in this Section are concerned mainly with whether an admitted imprisonment or arrest was false. The defendant, be he private citizen or police officer, has arrested the plaintiff. Was he justified in doing so? If not, he is liable to the plaintiff in a tort action for false arrest.

The common law rules of arrest attempted to strike a balance between the interest of the public in preventing crime and apprehending criminals and the interest of the individual in not having his freedom interferred with. These rules have been modified by statute in most jurisdictions.

The basic criminal law distinction at common law was between felonies, which in general were major crimes, and misdemeanors, which were minor crimes. The distinction was important not only with respect to the severity of the criminal penalties, but also with respect to the powers of police and private citizens to make arrests without warrants. These powers varied according to whether the particular crime was a felony or merely a misdemeanor. Of course, if there is no power of arrest an arrest is unlawful. An unlawful arrest may result in a criminal prosecution of the arrestor as well as a civil action being brought against him by the person arrested.

The distinction between felonies and misdemeanors was abolished in Canada in 1892: Criminal Code, S.C. 1892, 55-56 V., c. 29, s. 535. The distinction was not abolished in England until 1967: Criminal Law Act 1967, 15-16 Eliz. 11, c. 58, s. 1.

The present Criminal Code, R.S.C. 1970, c. C-34, distinguishes between indictable and other criminal offences. A number of sections dealing with the power of arrest follow (including amendments affected by the Bail Reform Act, R.S.C. 1970, c. 2 (2nd Supp.), s. 5):

> **25.** (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law
>
> (*a*) as a private person,
>
> (*b*) as a peace officer or public officer,
>
> (*c*) in aid of a peace officer or public officer, or
>
> (*d*) by virtue of his office,
>
> is, if he acts on reasonable and probable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.
>
> (4) A peace officer who is proceeding lawfully to arrest, with or without warrant, any person for an offence for which that person may be arrested without warrant, and every one lawfully assisting the peace officer, is justified, if the person to be arrested takes flight to avoid arrest, in using as much force as is necessary to prevent the escape by flight, unless the escape can be prevented by reasonable means in a less violent manner. 1953-54, c. 51, s. 25.

> **26.** Every one who is authorized by law to use force is criminally responsible for any excess thereof according to the nature and quality of the act that constitutes the excess. 1953-54, c. 51, s. 26.

The public expects a policeman not only to apprehend the criminal but to do his best to prevent the commission of crime, to keep the peace in other words. To deny him, therefore, the right to arrest a person who he reasonably believes is about to breach the peace would be to disable him from preventing that which might cause serious injury to someone or even to many people or to property. The common law, we believe, whilst recognising that a wrongful arrest is a serious invasion of a person's liberty, provides the police with this power in the public interest. In those instances of the exercise of this power which depend on a belief that a breach of the peace is imminent it must, we think we should emphasise, be established that it is not only an honest, albeit mistaken, belief but a belief which is founded on reasonable grounds.

A comprehensive definition of the term 'breach of the peace' has very rarely been formulated so far as we have been able, with considerable help from counsel, to discover from cases which go as far back as the eighteenth century. The older cases are of considerable interest but they are not a sure guide to what the term is understood to mean today, since keeping the peace in this country in the latter half of the twentieth century presents formidable problems which bear on the evolving process of the development of this branch of the common law. Nevertheless, even in these days when affrays, riotous behaviour and other disturbances happen all too frequently, we cannot accept that there can be a breach of the peace unless there has been an act done or threatened to be done which either actually harms a person, or in his presence his property, or is likely to cause such harm, or which puts someone in fear of such harm being done. There is nothing more likely to arouse resentment and anger in him, and a desire to take instant revenge, than attacks or threatened attacks on a person's body or property.

In 11 Halsbury's Laws (4th Edn) para 108 it is stated:

> 'For the purpose of the common law powers of arrest without warrant, a breach of the peace arises where there is an actual assault, or where public alarm and excitement are caused by a person's wrongful act. Mere annoyance and disturbance or insults to a person or abusive language, or great heat and fury without personal violence, are not generally sufficient.'

That is an amalgam of opinions expressed in various old cases which is principally criticised by counsel for the appellant for its failure to attach the actual commission of violence to all acts which are said to be capable of causing a breach of the peace. He makes a similar criticism of the crisp definition provided by the Attorney General, referred to in *Gelberg v Miller* [1961] 1 All ER 291 at 295, [1961] 1 WLR 153 at 158 with reference to the word disturbance. Lord Parker CJ said:

> 'The Attorney-General, to whom the court is grateful for his assistance, has appeared and has told the court that he feels unable to contend that a constable is entitled to arrest somebody for obstructing him in the course of his duty—which, of course, is a misdemeanour under s 2 of the Prevention of Crimes Amendment Act, 1885—unless the circumstances show that a breach of the peace or an apprehended breach of the peace is involved, meaning by that some affray or violence or possibly disturbance.'

The statement in Halsbury's Laws of England is in parts, we think, inaccurate because of its failure to relate all the kinds of behaviour there mentioned to violence. Furthermore, we think, the word 'disturbance' when used in isolation cannot constitute a breach of the peace. We are emboldened to say that there is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, an unlawful assembly or other disturbance. It is for this breach of the peace when done in his presence or the reasonable apprehension of it taking place that a constable, or anyone else, may arrest an offender without warrant.

But note the more limited powers with respect to breaches of the peace that seem to be given by sections 30 and 31 of the Criminal Code, supra.

In Hayes v. Thompson, [1985] 3 W.W.R. 366 (B.C.C.A.), the court held that, in addition to the powers of arrest for breach of the peace in the Code, the common law gives police officers the power to arrest for apprehended breaches of the peace.

In Tanner v. Norys, [1979] 5 W.W.R. 724 (Alta., Waite, J.), the defendant, a psychiatrist, who, without following the statutory procedures, on three occasions had the plaintiff committed to the paychiatric ward of a hospital was held liable to the plaintiff in an action for damages for false arrest and imprisonment. The defendant's appeal was allowed by the Alberta Court of Appeal on the basis, inter alia, that he had not breached the statutory procedures: [1980] 1 W.W.R. 33.]

RECOMMENDED READING

Bohlen and Shulman, Arrest With and Without a Warrant (1927), 75 U. Pa. L. Rev. 485